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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA,)	CIVIL ACTION NO.
)	99-296-E-BLW
Plaintiff,)	
)	
v.)	
)	
FMC CORPORATION, and)	REMEDIAL DESIGN/
J.R. SIMPLOT COMPANY,)	REMEDIAL ACTION CONSENT
)	DECREE WITH DEFENDANT
Defendants.)	J.R. SIMPLOT COMPANY

I. BACKGROUND

A. The United States of America ("United States"), on behalf of the Administrator of the United States Environmental Protection Agency ("EPA"), filed a complaint in this matter against the J.R. Simplot Company ("Simplot") pursuant to Sections 106 and 107 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9606, 9607.

B. The United States in its complaint seeks, inter alia: (1) reimbursement of costs incurred by EPA and the Department of Justice for response actions at the Eastern Michaud Flats ("EMF") Superfund Site ("Site") in Pocatello, Idaho, together with accrued interest; and (2) performance of response work by

1 defendant Simplot for the Simplot OU Area of the Site consistent
2 with the National Contingency Plan, 40 C.F.R. Part 300 (as
3 amended) ("NCP").

4 C. In accordance with the NCP and Section 121(f)(1)(F) of
5 CERCLA, 42 U.S.C. § 9621(f)(1)(F), EPA notified the State of
6 Idaho (the "State") of negotiations with potentially responsible
7 parties regarding the implementation of the remedial design and
8 remedial action for the Site, and EPA has provided the State with
9 an opportunity to participate in such negotiations and be a party
10 to this Consent Decree.

11 D. In accordance with Section 122(j)(1) of CERCLA, 42
12 U.S.C. § 9622(j)(1), EPA notified the U.S. Department of
13 Interior, including the U.S. Fish and Wildlife Service, on August
14 15, 1997 of negotiations with potentially responsible parties
15 regarding the release of hazardous substances that may have
16 resulted in injury to the natural resources under Federal
17 trusteeship and encouraged the trustee(s) to participate in the
18 negotiation of this Consent Decree.

19 E. The defendant entering into this Consent Decree,
20 Simplot ("Settling Defendant"), does not admit any liability to
21 Plaintiff arising out of the transactions or occurrences alleged
22 in the complaint, and does not acknowledge that the release or
23 threatened release of hazardous substances at or from the Site
24 constitutes an imminent or substantial endangerment to the public
25 health or welfare or the environment.

26 F. Pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605,
27 EPA placed the Site on the National Priorities List, set forth at
28 40 C.F.R. Part 300, Appendix B, by publication in the Federal
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1 Register on August 30, 1990, 55 Fed. Reg. 35502.

2 G. In response to a release or a substantial threat of a
3 release of hazardous substances at or from the Site, Settling
4 Defendant and FMC Corporation ("FMC") commenced a Remedial
5 Investigation and Feasibility Study ("RI/FS") for the Site
6 pursuant to 40 C.F.R. § 300.430, in June 1991, pursuant to an
7 Administrative Order On Consent issued by EPA on May 30, 1991.

8 H. Settling Defendant completed a Remedial Investigation
9 ("RI") Report and a Feasibility Study ("FS") Report in April
10 1997.

11 I. Pursuant to Section 117 of CERCLA, 42 U.S.C. § 9617,
12 EPA published notice of the completion of the FS and of the
13 proposed plan for remedial action on April 21, 1997, in a major
14 newspaper of general circulation, the Idaho State Journal, and in
15 the Shoshone Bannock News. EPA provided an opportunity for
16 written and oral comments from the public on the proposed plan
17 for remedial action. Public meetings to discuss the proposed
18 remedial action were held on May 13-14, 1997 in Pocatello, and on
19 the Fort Hall Reservation. Copies of written public comments
20 submitted are available as part of the administrative record.

21 J. The decision by EPA on the remedial action to be
22 implemented at the Site is embodied in a final Record of Decision
23 ("ROD"), issued on June 8, 1998, on which the State has given its
24 concurrence. The ROD includes a responsiveness summary to the
25 public comments. Notice of the final plan was published in
26 accordance with Section 117(b) of CERCLA.

27 K. Based on the information presently available to EPA,
28 EPA believes that the Work will be properly and promptly

1 conducted by Settling Defendant if conducted in accordance with
2 the requirements of this Consent Decree and its appendices.

3 L. Solely for the purposes of Section 113(j) of CERCLA,
4 the Remedial Action selected by the ROD and the Work to be
5 performed by Settling Defendant shall constitute a response
6 action taken or ordered by the President.

7 M. This Consent Decree resolves the United States' claims
8 against Simplot under Sections 106 and 107 of CERCLA for Past and
9 Interim Response Costs incurred at the Site, and for Simplot's
10 implementation of response actions for the Simplot OU Area of the
11 Site, as those terms are defined herein, and its reimbursement of
12 the United States' Future Response Costs associated with such
13 response actions. The Parties recognize, and the Court by
14 entering this Consent Decree finds, that this Consent Decree has
15 been negotiated by the Parties in good faith and implementation
16 of this Consent Decree will expedite the cleanup of the Simplot
17 OU Area of the Site and will avoid prolonged and complicated
18 litigation between the Parties, and that this Consent Decree is
19 fair, reasonable, and in the public interest.

20 NOW, THEREFORE, it is hereby Ordered, Adjudged, and Decreed:

21 II. JURISDICTION

22 1. This Court has jurisdiction over the subject matter of
23 this action pursuant to 28 U.S.C. §§ 1331 and 1345, and 42 U.S.C.
24 §§ 9606, 9607, and 9613(b). This Court also has personal
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1 jurisdiction over Settling Defendant. Solely for the purposes of
2 this Consent Decree and the underlying complaint, Settling
3 Defendant waives all objections and defenses it may have to
4 jurisdiction of the Court or to venue in this District. Settling
5 Defendant shall not challenge the terms of this Consent Decree or
6 this Court's jurisdiction to enter and enforce this Consent
7 Decree.

8 III. PARTIES BOUND

9 2. This Consent Decree applies to and is binding upon the
10 United States and upon Settling Defendant and its successors and
11 assigns. Any change in ownership or corporate status of Settling
12 Defendant including, but not limited to, any transfer of assets
13 or real or personal property, shall in no way alter Settling
14 Defendant's responsibilities under this Consent Decree.

15 3. Settling Defendant shall provide a copy of this Consent
16 Decree to each contractor hired to perform the Work (as defined
17 below) required by this Consent Decree and to each person
18 representing Settling Defendant with respect to the Work and
19 shall condition all contracts entered into hereunder upon
20 performance of the Work in conformity with the terms of this
21 Consent Decree. Settling Defendant or its contractors shall
22 provide written notice of the Consent Decree to all
23 subcontractors hired to perform any portion of the Work required
24 by this Consent Decree. Settling Defendant shall nonetheless be
25 responsible for ensuring that its contractors and subcontractors
26 perform the Work contemplated herein in accordance with this
27 Consent Decree. With regard to the activities undertaken
28 pursuant to this Consent Decree, each contractor and

1 subcontractor shall be deemed to be in a contractual relationship
2 with Settling Defendant within the meaning of Section 107(b)(3)
3 of CERCLA, 42 U.S.C. § 9607(b)(3).

4 IV. DEFINITIONS

5 4. Unless otherwise expressly provided herein, terms used
6 in this Consent Decree which are defined in CERCLA or in
7 regulations promulgated under CERCLA shall have the meaning
8 assigned to them in CERCLA or in such regulations. Whenever
9 terms listed below are used in this Consent Decree or in the
10 appendices attached hereto and incorporated hereunder, the
11 following definitions shall apply:

12 "CERCLA" shall mean the Comprehensive Environmental
13 Response, Compensation, and Liability Act of 1980, as amended, 42
14 U.S.C. §§ 9601 et seq.

15 "Consent Decree" shall mean this Decree and all appendices
16 attached hereto (listed in Section XXIX). In the event of
17 conflict between this Decree and any appendix, this Decree shall
18 control.

19 "Day" shall mean a calendar day unless expressly stated to
20 be a working day. "Working day" shall mean a day other than a
21 Saturday, Sunday, or Federal holiday. In computing any period of
22 time under this Consent Decree, where the last day would fall on
23 a Saturday, Sunday, or Federal holiday, the period shall run
24 until the close of business of the next working day.

25 "EPA" shall mean the United States Environmental Protection
26 Agency and any successor departments or agencies of the United
27 States.

28 "FMC OU Area" consists of the "FMC Plant Area" as that area
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1 is defined by Section 1.3 of the ROD, which definition does not
2 include the "Off-Plant Area" as defined by Section 1.3 of the
3 ROD.

4 "Future Response Costs for the Simplot and FMC OUs" shall
5 mean all costs, including, but not limited to, direct and
6 indirect costs, that the United States incurs with respect to the
7 Simplot and FMC OU Areas of the Site in reviewing or developing
8 plans, reports and other items pursuant to this Consent Decree,
9 verifying the Work, or otherwise implementing, overseeing, or
10 enforcing this Consent Decree, including, but not limited to,
11 payroll costs, contractor costs, travel costs, laboratory costs,
12 the costs incurred pursuant to Sections VII, IX (including, but
13 not limited to, the cost of attorney time and any monies paid to
14 secure access and/or to secure or implement institutional
15 controls including, but not limited to, the amount of just
16 compensation); XV (Emergency Response Action), and Paragraph 85
17 of Section XXI (Work Takeover). Future Response Costs shall also
18 include all Interest on the Past Response Costs that has accrued
19 pursuant to 42 U.S.C. § 9607(a) during the period from March 31,
20 1998 to the date of entry of this Consent Decree. Future
21 Response Costs shall not include costs incurred by the Agency for
22 Toxic and Substances Disease Registry ("ATSDR") for any health
23 assessment or health effects study carried out under Section
24 104(i) of CERCLA, in response to a release or threatened release
25 of hazardous substances from the Site.

26 "IDHW" shall mean the Idaho Department of Health and
27 Welfare, Division of Environmental Quality, and any successor
28 departments or agencies of the State.

1 "Interest" shall mean interest at the rate specified for
2 interest on investments of the Hazardous Substance Superfund
3 established under subchapter A of Chapter 98 of Title 26 of the
4 U.S. Code, compounded on October 1 of each year, in accordance
5 with 42 U.S.C. § 9607(a).

6 "Interim Response Costs" shall mean all costs, including
7 direct and indirect costs, paid by the United States in
8 connection with the Site between March 31, 1998 and the
9 effective date of this Consent Decree, or incurred prior to the
10 effective date of this Consent Decree but paid after that date.

11 "Interim Response Costs" shall not include costs incurred by
12 ATSDR for any health assessment or health effects study carried
13 out under Section 104(i) of CERCLA, in response to a release or
14 threatened release of hazardous substances from the Site.

15 "National Contingency Plan" or "NCP" shall mean the National
16 Oil and Hazardous Substances Pollution Contingency Plan
17 promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605,
18 codified at 40 C.F.R. Part 300, and any amendments thereto.

19 "Operation and Maintenance" or "O & M" shall mean all
20 activities required to maintain the effectiveness of the Remedial
21 Action as required under the Operation and Maintenance Plan
22 approved or developed by EPA pursuant to this Consent Decree and
23 the Statement of Work ("SOW").

24 "Paragraph" shall mean a portion of this Consent Decree
25 identified by an arabic numeral or an upper case letter.

26 "Parties" shall mean the United States and Settling
27 Defendant.

28 "Past Response Costs" shall mean all costs, including, but

1 not limited to, direct and indirect costs, that the United States
2 paid at or in connection with the Site through March 31, 1998,
3 including Interest on all such costs accrued pursuant to 42
4 U.S.C. § 9607(a) through such date. "Past Response Costs" does
5 not include costs incurred by ATSDR for any health assessment or
6 health effects study carried out under Section 104(i) of CERCLA,
7 in response to a release or threatened release of hazardous
8 substances from the Site.

9 "Performance Standards" shall mean the cleanup standards and
10 other measures of achievement of the goals of the Remedial
11 Action, set forth in Section 10 of the ROD and Section III of the
12 SOW and any modified standards established by EPA pursuant to the
13 "technical impracticability" provision of Paragraph 13.

14 "Plaintiff" shall mean the United States.

15 "RCRA" shall mean the Solid Waste Disposal Act, as amended,
16 42 U.S.C. §§ 6901 et seq. (also known as the Resource
17 Conservation and Recovery Act).

18 "Record of Decision" or "ROD" shall mean the EPA Record of
19 Decision relating to the Site signed on June 8, 1998, by the
20 Regional Administrator, EPA Region 10, and all attachments
21 thereto. The ROD is attached as Appendix A.

22 "Remedial Action" shall mean those activities, except for
23 Operation and Maintenance, to be undertaken by Settling Defendant
24 at the Simplot OU Area to implement the ROD, in accordance with
25 the SOW and the final Remedial Design Reports and Remedial Action
26 Work Plans and other plans approved by EPA.

27 "Remedial Action Work Plan" shall mean the document
28 developed pursuant to Paragraph 12 of this Consent Decree and

approved by EPA, and any amendments thereto.

1 "Remedial Design" shall mean those activities to be
2 undertaken by Settling Defendant at the Simplot OU Area to
3 develop the final plans and specifications for the Remedial
4 Action pursuant to the Remedial Design Reports.

5 "Remedial Design Reports" shall mean the documents that have
6 been developed pursuant to Paragraph 11 of this Consent Decree
7 and approved by EPA, and any amendments thereto.

8 "Section" shall mean a portion of this Consent Decree
9 identified by a roman numeral.

10 "Settling Defendant" shall mean the J.R. Simplot Company.

11 "Simplot OU Area" consists of the "Simplot Plant Area" as
12 that area is defined by Section 1.3 of the ROD, which definition
13 does not include the "Off-Plant Area" as defined by Section 1.3
14 of the ROD.

15 "Site" shall mean the Eastern Michaud Flats ("EMF")
16 Superfund Site, in the state of Idaho, approximately 2.5 miles
17 northwest of the city of Pocatello.

18 "State" shall mean the State of Idaho.

19 "Statement of Work" or "SOW" shall mean the statement of
20 work for implementation of the Remedial Design, Remedial Action,
21 and Operation and Maintenance at the Simplot OU of the Site, as
22 set forth in Appendix B to this Consent Decree and any
23 modifications made in accordance with this Consent Decree.

24 "Supervising Contractor" shall mean the principal contractor
25 retained by the Settling Defendant to supervise and direct the
26 implementation of the Work under this Consent Decree.

27 "United States" shall mean the United States of America.

28 "Waste Material" shall mean (1) any "hazardous substance"

1 under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); (2) any
2 pollutant or contaminant under Section 101(33), 42 U.S.C.
3 § 9601(33); and (3) any "solid waste" under Section 1004(27) of
4 RCRA, 42 U.S.C. § 6903(27).

5 "Work" shall mean all activities Settling Defendant is
6 required to perform for the Simplot OU Area under this Consent
7 Decree, except those required by Section XXV (Retention of
8 Records).

9 V. GENERAL PROVISIONS

10 5. Objectives of the Parties.

11 The objectives of the Parties in entering into this Consent
12 Decree are to protect public health or welfare or the environment
13 at the Site by the design and implementation of response actions
14 for the Simplot OU Area of the Site by Settling Defendant, to
15 reimburse response costs of the Plaintiff, and to resolve the
16 claims of Plaintiff against Settling Defendant as provided in
17 this Consent Decree.

18 6. Commitments by Settling Defendant.

19 Settling Defendant shall finance and perform the Work in
20 accordance with this Consent Decree, the ROD, the SOW, and all
21 work plans and other plans, standards, specifications, and
22 schedules set forth herein or developed by Settling Defendant and
23 approved by EPA pursuant to this Consent Decree. Settling
24 Defendant shall also reimburse the United States for Past,
25 Interim and Future Response Costs as provided in this Consent
26 Decree.

27 7. Compliance With Applicable Law.

28 All activities undertaken by Settling Defendant pursuant to
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1 this Consent Decree shall be performed in accordance with the
2 requirements of all applicable federal and state laws and
3 regulations. Settling Defendant must also comply with all
4 applicable or relevant and appropriate requirements of all
5 Federal and state environmental laws as set forth in the ROD and
6 the SOW. The activities conducted pursuant to this Consent
7 Decree, if approved by EPA, shall be considered to be consistent
8 with the NCP.

9 8. Permits.

10 a. As provided in Section 121(e) of CERCLA and
11 Section 300.400(e) of the NCP, no permit shall be required for
12 any portion of the Work conducted entirely on-site (i.e., within
13 the areal extent of contamination or in very close proximity to
14 the contamination and necessary for implementation of the Work).
15 Where any portion of the Work that is not on-Site requires a
16 federal or state permit or approval, Settling Defendant shall
17 submit timely and complete applications and take all other
18 actions necessary to obtain all such permits or approvals.

19 b. Settling Defendant may seek relief under the
20 provisions of Section XVIII (Force Majeure) of this Consent
21 Decree for any delay in the performance of the Work resulting
22 from a failure to obtain, or a delay in obtaining, any permit
23 required for the Work.

24 c. This Consent Decree is not, and shall not be
25 construed to be, a permit issued pursuant to any federal or state
26 statute or regulation.

27 9. Notice to Successors-in-Title.

28 a. With respect to any property owned or controlled by
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1 the Settling Defendant that is located within the Site, within 30
2 days after the entry of this Consent Decree, Settling Defendant
3 shall submit to EPA for review and approval a notice to be filed
4 with the Recorder's Office, Bannock County, State of Idaho, which
5 shall provide notice to all successors-in-title that the property
6 is part of the Site, that EPA selected a remedy for the Site on
7 June 8, 1998, and that Settling Defendant has entered into a
8 Consent Decree requiring implementation of the remedy. Such
9 notice(s) shall identify the United States District Court in
10 which the Consent Decree was filed, the name and civil action
11 number of this case, and the date the Consent Decree was entered
12 by the Court. Settling Defendant shall record the notice(s)
13 within 10 days of EPA's approval of the notice(s). Settling
14 Defendant shall provide EPA with a certified copy of the recorded
15 notice(s) within 10 days of recording such notice(s).

16 b. Prior to the delisting of the Site, at least 30
17 days prior to the conveyance of any interest in property owned by
18 Settling Defendant located within the Site including, but not
19 limited to, fee interests, leasehold interests, and mortgage
20 interests, Settling Defendant shall give the grantee written
21 notice of (i) this Consent Decree, (ii) any instrument by which
22 an interest in real property has been conveyed that confers a
23 right of access to the Site (hereinafter referred to as "access
24 easements") pursuant to Section IX (Access and Institutional
25 Controls), and (iii) any instrument by which an interest in real
26 property has been conveyed that confers a right to enforce
27 restrictions on the use of such property (hereinafter referred to
28 as "restrictive easements") pursuant to Section IX (Access and

1 Institutional Controls). At least 30 days prior to such
2 conveyance, Settling Defendant shall also give written notice to
3 EPA and the State of the proposed conveyance, including the name
4 and address of the grantee, and the date on which notice of the
5 Consent Decree, access easements, and/or restrictive easements
6 was given to the grantee.

7 c. In the event of any such conveyance, Settling
8 Defendant's obligations under this Consent Decree, including, but
9 not limited to, its obligation to provide or secure access and
10 institutional controls, as well as to abide by such institutional
11 controls, pursuant to Section IX (Access and Institutional
12 Controls) of this Consent Decree, shall continue to be met by the
13 Settling Defendant. In no event shall the conveyance release or
14 otherwise affect the liability of Settling Defendant to comply
15 with all provisions of this Consent Decree, absent the prior
16 written consent of EPA. If the United States approves, the
17 grantee may perform some or all of the Work under this Consent
18 Decree.

19 VI. PERFORMANCE OF THE WORK BY SETTLING DEFENDANT

20 10. Selection of Supervising Contractor.

21 a. All aspects of the Work to be performed by
22 Settling Defendant pursuant to Sections VI (Performance of the
23 Work by Settling Defendant), VII (Remedy Review), VIII (Quality
24 Assurance, Sampling and Data Analysis), and XV (Emergency
25 Response) of this Consent Decree shall be under the direction and
26 supervision of the Supervising Contractor, the selection of which
27 shall be subject to disapproval by EPA. Within 30 days after the
28 lodging of this Consent Decree, Settling Defendant shall notify

1 EPA in writing of the name, title, and qualifications of any
2 contractor proposed to be the Supervising Contractor. EPA will
3 issue a notice of disapproval or an authorization to proceed. If
4 at any time thereafter, Settling Defendant proposes to change a
5 Supervising Contractor, Settling Defendant shall give such notice
6 to EPA and must obtain an authorization to proceed from EPA
7 before the new Supervising Contractor performs, directs, or
8 supervises any Work under this Consent Decree. The Settling
9 Defendant's Project Coordinator designated pursuant to Section
10 XII may also be designated to carry out the functions of the
11 Supervising Contractor.

12 b. If EPA disapproves a proposed Supervising
13 Contractor, EPA will notify Settling Defendant in writing.
14 Settling Defendant shall submit to EPA a list of contractors,
15 including the qualifications of each contractor, that would be
16 acceptable to it within 30 days of receipt of EPA's disapproval
17 of the contractor previously proposed. EPA will provide written
18 notice of the names of any contractor(s) that it disapproves and
19 an authorization to proceed with respect to any of the other
20 contractors. Settling Defendant may select any contractor from
21 that list that is not disapproved and shall notify EPA of the
22 name of the contractor selected within 30 days of EPA's
23 authorization to proceed.

24 c. If EPA fails to provide written notice of its
25 authorization to proceed or disapproval as provided in this
26 Paragraph and this failure prevents the Settling Defendant from
27 meeting one or more deadlines in a plan approved by the EPA
28 pursuant to this Consent Decree, Settling Defendant may seek

1 relief under the provisions of Section XVIII (Force Majeure)
2 hereof.

3 11. Remedial Design.

4 a. The Parties have divided Remedial Design reporting
5 and deliverables for the Simplot OU into separate categories of
6 Work with corresponding reports called Remedial Design Reports
7 (RDRs) including Final Design Reports as set forth in the SOW,
8 including a schedule for submission. This division reflects
9 tasks previously undertaken, differences in time lines required
10 for tasks, and is more efficient than use of a single Remedial
11 Design Work Plan as contemplated by the Model RD/RA Consent
12 Decree. Upon approval by EPA, each RDR shall be incorporated
13 into and become enforceable under this Consent Decree. Within 60
14 days after EPA's issuance of an authorization to proceed, the
15 Settling Defendant shall submit to EPA and the State a Health and
16 Safety Plan for field design activities which conforms to the
17 applicable Occupational Safety and Health Administration and EPA
18 requirements including, but not limited to, 29 C.F.R. § 1910.120.

19 b. Upon approval of each RDR by EPA, and submittal of
20 the Health and Safety Plan for all field activities to EPA,
21 Settling Defendant shall implement the RDRs. Settling Defendant
22 shall submit all plans, submittals and other deliverables
23 required under the approved RDR(s) to EPA in accordance with
24 Section XI (EPA Approval of Plans and Other Submissions). Unless
25 otherwise directed by EPA, Settling Defendant shall not commence
26 further Remedial Design activities at the Site prior to approval
27 of the RDR for such work.

28

1 12. Remedial Action.

2 a. Within 90 days after the approval of each Final
3 Design Report, Settling Defendant shall submit a work plan to EPA
4 for the performance of such component Remedial Action at the
5 Simplot OU ("Remedial Action Work Plan") as set forth in the SOW.
6 Together, the Remedial Action Work Plans shall provide for
7 construction and implementation of the remedy set forth in the
8 ROD for the Simplot OU Area and achievement of the applicable
9 Performance Standards for the Simplot OU Area, in accordance with
10 this Consent Decree, the ROD, the SOW, and the design plans and
11 specifications developed in accordance with the Final RDR
12 approved by EPA. Upon approval by EPA, each Remedial Action Work
13 Plan shall be incorporated into and become enforceable under this
14 Consent Decree. At the same time as it submits the first
15 Remedial Action Work Plan, Settling Defendant shall submit a
16 Health and Safety Plan to EPA for field activities required by
17 the Remedial Action Work Plans which conforms to the applicable
18 Occupational Safety and Health Administration and EPA
19 requirements including, but not limited to, 29 C.F.R. § 1910.120.

20 b. Remedial Action Work Plans shall include the
21 following: (1) the schedule for completion of the Remedial
22 Action; (2) method for selection of the contractor; (3) schedule
23 for developing and submitting other required Remedial Action
24 plans; (4) methodology for implementation of the Construction
25 Quality Assurance Plan; (5) a groundwater monitoring plan; (6)
26 methods for satisfying permitting requirements if applicable; (7)
27 methodology for implementation of the Operation and Maintenance
28 Plan; (8) methodology for implementation of the Contingency Plan;

1 (9) tentative formulation of the Remedial Action team; (10)
2 construction quality control plan (by constructor); and (11)
3 procedures and plans for the decontamination of equipment and the
4 disposal of contaminated materials. Remedial Action Work Plans
5 also shall include a schedule for implementation of all
6 applicable Remedial Action tasks identified in the final design
7 submittal and shall identify the initial formulation of the
8 Settling Defendant's Remedial Action Project Team (including, but
9 not limited to, the Supervising Contractor).

10 c. Upon approval of each Remedial Action Work Plan by
11 EPA, after a reasonable opportunity for review and comment by the
12 State, Settling Defendant shall implement the activities required
13 under such Remedial Action Work Plan. Settling Defendant shall
14 submit to EPA and the State all plans, submittals, or other
15 deliverables required under the approved Remedial Action Work
16 Plan in accordance with the attached SOW. Unless otherwise
17 directed by EPA, Settling Defendant shall not commence physical
18 Remedial Action activities at the Site prior to approval of the
19 applicable Remedial Action Work Plan.

20 13. Attainment of Performance Standards.

21 Settling Defendant shall continue to implement the Remedial
22 Action and O&M until the Performance Standards are achieved for
23 the Simplot OU Area and for so long thereafter as is otherwise
24 required under this Consent Decree. Settling Defendant reserves
25 the right to seek relief pursuant to 42 U.S.C. § 9621(d)(4)(C) or
26 40 C.F.R. § 300.430(f)(1)(ii)(C)(3).
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1 14. Modification of the SOW or Related Work Plans.

2 a. If EPA determines that modification to the work
3 for the Simplot OU Area specified in the SOW and/or in work plans
4 developed pursuant to the SOW is necessary to achieve and
5 maintain the Performance Standards or to carry out and maintain
6 the effectiveness of the remedy set forth in the ROD, EPA may
7 require that such modification be incorporated in the SOW and/or
8 such work plans. Provided, however, that a modification may only
9 be required pursuant to this Paragraph to the extent that it is
10 consistent with the scope of the remedy selected in the ROD.

11 b. For the purposes of this Paragraph 14 and
12 Paragraphs 48 and 49 only, the "scope of the remedy selected in
13 the ROD" is limited to the specific actions detailed for the
14 Simplot OU Area in Section 10.1, entitled "Selected Remedy" of
15 the ROD, as further detailed in Section III. D. of Appendix B.

16 c. If Settling Defendant objects to any modification
17 determined by EPA to be necessary pursuant to this Paragraph, it
18 may seek dispute resolution pursuant to Section XIX (Dispute
19 Resolution), Paragraph 66 (record review). The SOW and/or
20 related work plans shall be modified in accordance with final
21 resolution of the dispute.

22 d. Settling Defendant shall implement any work
23 required by any modifications incorporated in the SOW and/or in
24 work plans developed pursuant to the SOW in accordance with this
25 Paragraph.

26 e. Nothing in this Paragraph shall be construed to
27 limit EPA's authority to require performance of further response
28 actions as otherwise provided in this Consent Decree.

1 15. Settling Defendant acknowledges and agrees that nothing
2 in this Consent Decree, the SOW, or the Remedial Design Reports
3 or Remedial Action Work Plans constitutes a warranty or
4 representation of any kind by Plaintiff that compliance with the
5 work requirements set forth in the SOW and the Work Plans will
6 achieve the Performance Standards.

7 16. Shipments of Waste Material Out of State.

8 a. Settling Defendant shall, seven days prior to any
9 off-Site shipment of Waste Material generated from the
10 performance of the Work to an out-of-state waste management
11 facility, provide written notification to the appropriate state
12 environmental official in the receiving facility's state and to
13 the EPA Project Coordinator of such shipment of Waste Material.
14 However, this notification requirement shall not apply to any
15 off-Site shipments when the total volume of each such shipment
16 will not exceed 10 cubic yards.

17 b. Settling Defendant shall include in the written
18 notification the following information, where available: (1) the
19 name and location of the facility to which the Waste Material is
20 to be shipped; (2) the type and quantity of the Waste Material to
21 be shipped; (3) the expected schedule for the shipment of the
22 Waste Material; and (4) the method of transportation. Settling
23 Defendant shall notify the state in which the planned receiving
24 facility is located of major changes in the shipment plan, such
25 as a decision to ship the Waste Material to another facility
26 within the same state, or to a facility in another state.

27 c. The identity of the receiving facility and state
28 will be determined by Settling Defendant following the award of
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1 the contract for Remedial Action construction. Settling
2 Defendant shall provide the information required by Paragraph
3 16.b. as soon as practicable after the information is identified
4 and seven days before the Waste Material is actually shipped.

5 VII. REMEDY REVIEW

6 17. Periodic Review. Settling Defendant shall conduct any
7 studies and investigations as requested by EPA in writing for the
8 Simplot OU Area, in order to permit EPA to conduct reviews of
9 whether the Remedial Action is protective of human health and the
10 environment at least every five years as required by Section
11 121(c) of CERCLA and any applicable regulations.

12 18. EPA Selection of Further Response Actions. If EPA
13 determines, at any time, that the Remedial Action is not,
14 protective of human health and the environment, EPA may select
15 further response actions for the Site, including the Simplot OU
16 Area of the Site, in accordance with the requirements of CERCLA
17 and the NCP.

18 19. Opportunity To Comment. Settling Defendant and, if
19 required by Sections 113(k)(2) or 117 of CERCLA, the public, will
20 be provided with an opportunity to comment on any further
21 response actions proposed by EPA as a result of the review
22 conducted pursuant to Section 121(c) of CERCLA and to submit
23 written comments for the record during the comment period.

24 20. Settling Defendant's Obligation To Perform Further
25 Response Actions. If EPA selects further response actions for
26 the Simplot and/or FMC OU Areas, Settling Defendant shall
27 undertake such further response actions to the extent that the
28 reopener conditions in Paragraph 81 or Paragraph 82 (United
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1 States' reservations of liability based on unknown conditions or
2 new information) are satisfied. Settling Defendant may invoke
3 the procedures set forth in Section XIX (Dispute Resolution) to
4 dispute (1) EPA's determination that the reopening conditions of
5 Paragraph 81 or Paragraph 82 of Section XXI (Covenants Not To Sue
6 by Plaintiff) are satisfied, (2) EPA's determination that the
7 Remedial Action is not protective of human health and the
8 environment, or (3) EPA's selection of the further response
9 actions. Disputes pertaining to whether the Remedial Action is
10 protective or to EPA's selection of further response actions
11 shall be resolved pursuant to Paragraph 66 (record review).

12 21. Submissions of Plans. If Settling Defendant is
13 required to perform further response actions pursuant to
14 Paragraph 20, it shall submit a plan for such work to EPA for
15 approval in accordance with the procedures set forth in
16 Section VI (Performance of the Work by Settling Defendant) and
17 shall implement the plan approved by EPA in accordance with the
18 provisions of this Decree.

19 VIII. QUALITY ASSURANCE, SAMPLING, AND DATA ANALYSIS

20 22. Settling Defendant shall use quality assurance, quality
21 control, and chain of custody procedures for all samples in
22 accordance with "EPA Requirements for Quality Assurance Project
23 Plans for Environmental Data Operation," (EPA QA/R5; "Preparing
24 Perfect Project Plans,") (EPA /600/9-88/087), and subsequent
25 amendments to such guidelines upon notification by EPA to
26 Settling Defendants of such amendment. Amended guidelines shall
27 apply only to procedures conducted after such notification.

28 Prior to the commencement of any monitoring project under this
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1 Consent Decree, Settling Defendant shall submit a Quality
2 Assurance Project Plan ("QAPP") to EPA for approval that is
3 consistent with the SOW, the NCP and applicable guidance
4 documents. If relevant to the proceeding, the Parties agree that
5 validated sampling data generated in accordance with the QAPP(s)
6 and reviewed and approved by EPA shall be admissible as evidence,
7 without objection, in any proceeding under this Decree. Settling
8 Defendant shall ensure that EPA personnel and its authorized
9 representatives are allowed access at reasonable times to all
10 laboratories utilized by Settling Defendant in implementing this
11 Consent Decree. Settling Defendant shall ensure that such
12 laboratories shall analyze all samples submitted by EPA pursuant
13 to the QAPP for quality assurance monitoring. Settling Defendant
14 shall ensure that the laboratories it utilizes for the analysis
15 of samples taken pursuant to this Decree perform all analyses
16 according to accepted EPA methods. Accepted EPA methods consist
17 of those methods which are documented in the "Contract Lab
18 Program Statement of Work for Inorganic Analysis" and the
19 "Contract Lab Program Statement of Work for Organic Analysis,"
20 dated February 1988, and any amendments made thereto during the
21 course of the implementation of this Decree. Settling Defendant
22 shall ensure that all laboratories it uses for analysis of
23 samples taken pursuant to this Consent Decree participate in an
24 EPA or EPA-equivalent QA/QC program. Settling Defendant shall
25 ensure that all field methodologies utilized in collecting
26 samples for subsequent analysis pursuant to this Decree will be
27 conducted in accordance with the procedures set forth in the QAPP
28 approved by EPA.

1 23. Upon request, Settling Defendant shall allow split or
2 duplicate samples to be taken by EPA or its authorized
3 representatives. Settling Defendant shall notify EPA not less
4 than 28 days in advance of any sample collection activity unless
5 shorter notice is agreed to by EPA. EPA shall have the right to
6 take any additional samples that EPA deems necessary. Upon
7 request, EPA shall allow Settling Defendant to take split or
8 duplicate samples of any samples it takes as part of the
9 Plaintiff's oversight of the Settling Defendant's implementation
10 of the Work.

11 24. Settling Defendant shall submit four copies of the
12 results to EPA of all sampling and/or tests or other data
13 obtained or generated by or on behalf of Settling Defendant with
14 respect to the Site and/or the implementation of this Consent
15 Decree unless EPA agrees otherwise.

16 25. Notwithstanding any provision of this Consent Decree,
17 the United States hereby retains all of its information gathering
18 and inspection authorities and rights, including enforcement
19 actions related thereto, under CERCLA, RCRA and any other
20 applicable statutes or regulations.

21 IX. ACCESS AND INSTITUTIONAL CONTROLS

22 26. Commencing upon the date of lodging of this Consent
23 Decree, Settling Defendant agrees to provide the United States,
24 and its representatives, including EPA and its contractors,
25 access at all reasonable times to the Site and any other property
26 to which access is required for the implementation of this
27 Consent Decree, to the extent access to such property is
28 controlled by Settling Defendant, for the purposes of conducting

1 any activity related to this Consent Decree including, but not
2 limited to:

3 A. Monitoring the Work;

4 B. Verifying any data or information submitted to the
5 United States or the State;

6 C. Conducting investigations relating to
7 contamination at or near the Site;

8 D. Obtaining samples;

9 E. Assessing the need for, planning, or implementing
10 additional response actions at or near the Site;

11 F. Inspecting and copying records, operating logs,
12 contracts, or other documents maintained or generated by Settling
13 Defendant or its agents, consistent with Section XXIV;

14 G. Assessing Settling Defendant's compliance with
15 this Consent Decree;

16 H. Implementing the Work pursuant to the conditions
17 set forth in Paragraph 85 of this Consent Decree;

18 I. Determining whether the property is being used in
19 a manner that is prohibited by this Consent Decree or related
20 agreements, restrictions or easements;

21 J. Following delisting, the access granted by this
22 Paragraph shall be limited to the performance by EPA of five year
23 reviews, pursuant to Section 121(c) of CERCLA;

24 K. Commencing upon the date of lodging of this
25 Consent Decree, and until EPA certifies that the Performance
26 Standards for ground water have been met, Settling Defendant
27 agrees not to use Site property for which land use restrictions
28 are required by the Remedial Action to protect, the public health

1 or the environment during or after implementation of the Remedial
2 Action, in violation of any of the following restrictions:

3 i. Affected ground water underlying the property
4 shall not be consumed. Any changes in extraction of affected
5 groundwater shall require 21 day advance notice and approval by
6 EPA before implementation. However, in the event of an emergency
7 in which the delay caused by this requirement would significantly
8 impair plant operations or public health and safety, Settling
9 Defendant need only provide notice within 24 hours after
10 installation. Within 30 days after any emergency installation,
11 Settling Defendant shall provide EPA with an analysis of the new
12 installation's potential impacts on the groundwater monitoring
13 network and the Site remedy, if any. The requirements of this
14 Subparagraph 26(K)(i). shall not apply after the Performance
15 Standards for ground water are achieved;

16 ii. No use or activity on property owned by
17 Settling Defendant shall be permitted that will disturb any of
18 the remedial measures that will be implemented pursuant to this
19 Consent Decree; and

20 L. If Settling Defendant seeks to undertake any
21 restricted use or activity on Site property, it may file a
22 petition with EPA setting forth the nature of the use or
23 activity, the reason why the use or activity is necessary, and
24 any expected impact of the use or activity on the remedy, the
25 public health, and the environment. Settling Defendant may
26 undertake the restricted use or activity only if EPA determines,
27 in its sole and unreviewable discretion, to allow such use or
28 activity to be implemented pursuant to an approved plan.

1 27. a. To the extent that the Site or any other property
2 for which access or land use restrictions are required for the
3 implementation of this Consent Decree is owned or controlled by
4 persons other than a Settling Defendant including, but not
5 limited to, such property described in Appendix "A", Settling
6 Defendant shall use best efforts to secure from such persons an
7 agreement to provide the United States and the State and their
8 representatives, including, but not limited to, EPA and its
9 contractors, as well as Settling Defendant: (i) access to the
10 property for the purpose of conducting any activity related to
11 this Consent Decree including, but not limited to, those
12 activities listed in this Paragraph, and (ii) the right to
13 enforce the land use restrictions required by this Consent Decree
14 in the manner set forth in Appendix "C". For purposes of
15 securing access pursuant to this Subparagraph "best efforts"
16 includes the payment of reasonable sums of money in consideration
17 of the agreement. If any agreement required by this Subparagraph
18 is not obtained within 45 days after the date of lodging of this
19 Consent Decree, or within 45 days after the date EPA notifies
20 Settling Defendant in writing that additional agreements beyond
21 those previously secured are necessary, Settling Defendant shall
22 promptly notify the United States in writing, and shall include
23 in that notification a summary of the steps Settling Defendant
24 has taken to attempt to obtain the agreement. The United States
25 or the State may, as it deems appropriate, assist Settling
26 Defendant in obtaining these agreements.

27 b. To the extent that the Site or any other property
28 for which access or land use restrictions are required for the

1 implementation of this Consent Decree is owned or controlled by
2 persons other than a Settling Defendant including, but not
3 limited to, the property described in Appendix "A", Settling
4 Defendant shall use best efforts to secure from such persons
5 agreements to file the easements described below. For the
6 purposes of this Subparagraph "best efforts" includes the payment
7 of reasonable sums of money in consideration of the filing of
8 these easements in accordance with the procedures set forth in
9 Appendix "A". Settling Defendant shall, within 90 days after
10 entry of this Consent Decree, submit to the following for EPA
11 review and approval:

12 i. A draft easement substantially in the form
13 attached to this Consent Decree as Appendix "C", that grants to
14 Settling Defendant and their representatives, including EPA and
15 its contractors: (A) a right of access, running with the land for
16 the full duration of the applicable easement period, for the
17 purpose of conducting any activity related to this Consent
18 Decree, and (B) a right, running with the land for the full
19 duration of the applicable easement period, to enforce the land
20 use restrictions required by this Consent Decree. The easement
21 shall be enforceable under the laws of Idaho, shall be free and
22 clear of all prior liens and encumbrances, shall be acceptable
23 under the Attorney General's Title Regulations promulgated
24 pursuant to 40 U.S.C. § 255, and any modification thereof by
25 Settling Defendant and any Grantor must be pre-approved by EPA in
26 writing; and

27 ii. A current title commitment or report prepared
28 in accordance with the U.S. Department of Justice Standards for
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1 the Preparation of Title Evidence in Land Acquisitions by the
2 United States ("the Standards").

3 c. Within 30 days after EPA approval and acceptance
4 of the easement, Settling Defendant shall update the title search
5 and, if it is determined that nothing has occurred since the
6 effective date of the commitment or report to affect the title
7 adversely, file the easement with the Recorder's Office or
8 Registry of Deeds or other appropriate office, of Bannock County,
9 Idaho. Within 60 days of filing the easement, Settling Defendant
10 shall provide EPA with a title insurance policy or other final
11 title evidence acceptable under the Standards, and the original
12 recorded easement or a certified copy thereof showing the clerk's
13 recording stamps. If any easement required by this Subparagraph
14 is not submitted to EPA for review and approval within 90 days
15 after the date of entry of this Consent Decree, Settling
16 Defendant shall promptly notify the United States in writing, and
17 shall include in that notification a summary of the steps
18 Settling Defendant has taken to attempt to obtain such easements.
19 If EPA notifies Settling Defendant in writing that additional
20 easements, with respect to property that is not owned or
21 controlled by Settling Defendant, are required for implementation
22 of this Consent Decree, Settling Defendant shall respond by
23 following the procedure outlined in this Subparagraph as though
24 the property had been identified in this Consent Decree, except
25 that the time requirements shall commence with the date of
26 receipt of the written notice, as opposed to the date of entry of
27 the Consent Decree. Transfers of Simplot OU property owned by
28 Settling Defendant must include all access grants and all

restrictions or limitations (institutional controls) as described
1 in this Consent Decree in the transferee's deed or such transfers
2 shall be void or voidable.

3 28. Notwithstanding any provision of this Consent Decree,
4 the United States retains all of its access authorities and
5 rights, including enforcement authorities related thereto, under
6 CERCLA, RCRA and any other applicable statute or regulations.

7 X. REPORTING REQUIREMENTS

8 29. In addition to any other requirement of this Consent
9 Decree, Settling Defendant shall submit two copies of written
10 monthly progress reports to EPA that: (a) describe the actions
11 which have been taken toward achieving compliance with this
12 Consent Decree during the previous month; (b) include a summary
13 of all results of sampling and tests and all other data received
14 or generated by Settling Defendant or its contractors or agents
15 in the previous month; (c) identify all work plans, plans and
16 other deliverables required by this Consent Decree completed and
17 submitted during the previous month; (d) describe all actions,
18 including, but not limited to, data collection and
19 implementation of work plans, which are scheduled for the next
20 six weeks and provide other information relating to the progress
21 of construction, including, but not limited to, critical path
22 diagrams, Gantt charts and/or Pert charts as appropriate; (e)
23 include information regarding percentage of completion,
24 unresolved delays encountered or anticipated that may affect the
25 future schedule for implementation of the Work, and a description
26 of efforts made to mitigate those delays or anticipated delays;
27 (f) include an explanation of any modifications to the work plans
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or other schedules that Settling Defendant has proposed to EPA or
1 that have been approved by EPA; and (g) describe all activities
2 undertaken in support of the Community Relations Plan during the
3 previous month and those to be undertaken in the next six weeks.
4 Settling Defendant shall submit these progress reports to EPA by
5 the tenth day of every month following the lodging of this
6 Consent Decree until EPA notifies the Settling Defendant pursuant
7 to Paragraph 49.b of Section XIV (Certification of Completion).
8 If requested by EPA, Settling Defendant shall also provide
9 briefings for EPA to discuss the progress of the Work.

10 30. Settling Defendant shall notify EPA of any change in
11 the schedule described in the monthly progress report for the
12 performance of any activity, including, but not limited to, data
13 collection and implementation of work plans, no later than seven
14 days prior to the performance of the activity.

15 31. Upon the occurrence of any event during performance of
16 the Work that Settling Defendant is required to report pursuant
17 to Section 103 of CERCLA or Section 304 of the Emergency Planning
18 and Community Right-to-know Act (EPCRA), Settling Defendant shall
19 within 24 hours of the onset of such event orally notify the EPA
20 Project Coordinator or the Alternate EPA Project Coordinator (in
21 the event of the unavailability of the EPA Project Coordinator),
22 or, in the event that neither the EPA Project Coordinator or
23 Alternate EPA Project Coordinator is available, the Emergency
24 Response Section, Region 10, U.S. EPA. These reporting
25 requirements are in addition to the reporting required by CERCLA
26 Section 103 or EPCRA Section 304.

27 32. Within 20 days of the onset of such an event, Settling
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Defendant shall furnish a written report to EPA, signed by the
1 Settling Defendant's Project Coordinator, setting forth the
2 events which occurred and the measures taken, and to be taken, in
3 response thereto. Within 30 days of the conclusion of such an
4 event, Settling Defendant shall submit a report setting forth all
5 actions taken in response thereto.

6 33. Settling Defendant shall submit 3 copies of all plans,
7 reports, and data required by the SOW, the Remedial Design
8 Reports, the Remedial Action Work Plans, or any other approved
9 plans to EPA in accordance with the schedules set forth in such
10 plans. Settling Defendant shall simultaneously submit 1 copy of
11 all such plans, reports and data to the State.

12 34. All reports and other documents submitted by Settling
13 Defendant to EPA (other than monthly progress reports referred to
14 above) which purport to document Settling Defendant's compliance
15 with this Consent Decree shall be signed by an authorized
16 representative of Settling Defendant.

17 XI. EPA APPROVAL OF PLANS AND OTHER SUBMISSIONS

18 35. After review of any plan, report or other item which is
19 required to be submitted for approval pursuant to this Consent
20 Decree, EPA, shall: (a) approve the submission in whole or in
21 part; (b) approve the submission upon specified conditions; (c)
22 modify the submission to cure the deficiencies; (d) disapprove
23 the submission in whole or in part, directing that Settling
24 Defendant modify the submission; or (e) any combination of the
25 above. However, EPA shall not modify a submission without first
26 providing Settling Defendant at least one notice of deficiency
27 and an opportunity to cure within seven days, except where to do
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so would cause serious disruption to the work or where previous submissions have been disapproved due to material defects and the deficiencies in the submission under consideration indicate a bad faith lack of effort to submit an acceptable deliverable.

36. In the event of approval, approval upon conditions, or modification by EPA, pursuant to Paragraph 35(a), (b), or (c), Settling Defendant shall proceed to take any action required by the plan, report, or other item, as approved or modified by EPA subject only to its right to invoke the Dispute Resolution procedures set forth in Section XIX (Dispute Resolution) with respect to the modifications or conditions made by EPA. If EPA modifies the submission to cure the deficiencies pursuant to Paragraph 35(c) and the submission has a material defect, EPA retains its right to seek stipulated penalties, as provided in Section XX (Stipulated Penalties).

37. a. Upon receipt of a notice of disapproval pursuant to Paragraph 35(d), Settling Defendant shall, within seven days or such longer time as specified by EPA in such notice, correct the deficiencies and resubmit the plan, report, or other item for approval. Any stipulated penalties applicable to the submission, as provided in Section XX, shall accrue during the seven-day period or otherwise specified period but shall not be payable unless the resubmission is disapproved or modified due to a material defect as provided in Paragraphs 38 and 39.

b. Notwithstanding the receipt of a notice of disapproval pursuant to Paragraph 35(d), Settling Defendant shall proceed, at the direction of EPA, to take any action required by any non-deficient portion of the submission. Implementation of

any non-deficient portion of a submission shall not relieve
1 Settling Defendant of any liability for stipulated penalties
2 under Section XX (Stipulated Penalties).

3 38. If a resubmitted plan, report or other item, or portion
4 thereof, is disapproved by EPA, EPA may again require Settling
5 Defendant to correct the deficiencies, in accordance with the
6 preceding Paragraphs. EPA also retains the right to modify or
7 develop the plan, report or other item. Settling Defendant shall
8 implement any such plan, report, or item as modified or developed
9 by EPA, subject only to its right to invoke the procedures set
10 forth in Section XIX (Dispute Resolution).

11 39. If upon resubmission, a plan, report, or item is
12 disapproved or modified by EPA due to a material defect, Settling
13 Defendant shall be deemed to have failed to submit such plan,
14 report, or item timely and adequately unless the Settling
15 Defendant invokes the dispute resolution procedures set forth in
16 Section XIX (Dispute Resolution) and EPA's action is overturned
17 pursuant to that Section. The provisions of Section XIX (Dispute
18 Resolution) and Section XX (Stipulated Penalties) shall govern
19 the implementation of the Work and accrual and payment of any
20 stipulated penalties during Dispute Resolution. If EPA's
21 disapproval or modification is upheld, stipulated penalties shall
22 accrue for such violation from the date on which the initial
23 submission was originally required, as provided in Section XX.

24 40. All plans, reports, and other items required to be
25 submitted to EPA under this Consent Decree shall, upon approval
26 or modification by EPA, be enforceable under this Consent Decree.
27 In the event EPA approves or modifies a portion of a plan,
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report, or other item required to be submitted to EPA under this
1 Consent Decree, the approved or modified portion shall be
2 enforceable under this Consent Decree.

3 XII. PROJECT COORDINATORS

4 41. Within 20 days of the lodging of this Consent Decree,
5 Settling Defendant and EPA will notify each other, in writing, of
6 the name, address and telephone number of their respective
7 designated Project Coordinators and Alternate Project
8 Coordinators. If a Project Coordinator or Alternate Project
9 Coordinator initially designated is changed, the identity of the
10 successor will be given to the other Party at least five working
11 days before the changes occur, unless impracticable, but in no
12 event later than the actual day the change is made. Settling
13 Defendant's Project Coordinator shall be subject to disapproval
14 by EPA and shall have the technical expertise sufficient to
15 adequately oversee all aspects of the Work. Settling Defendant's
16 Project Coordinator shall not be an attorney. He or she may
17 assign other representatives, including other contractors, to
18 serve as a Site representative for oversight of performance of
19 daily operations during remedial activities.

20 42. Plaintiff may designate other representatives,
21 including, but not limited to, EPA and State employees, and
22 federal or State contractors and consultants, to observe and
23 monitor the progress of any activity undertaken pursuant to this
24 Consent Decree. EPA's Project Coordinator and Alternate Project
25 Coordinator shall have the authority lawfully vested in a
26 Remedial Project Manager (RPM) and an On-Scene Coordinator (OSC)
27 by the National Contingency Plan, 40 C.F.R. Part 300. In
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addition, EPA's Project Coordinator or Alternate Project
Coordinator shall have authority, consistent with the National
Contingency Plan, to halt any Work required by this Consent
Decree and to take any necessary response action when s/he
determines that conditions at the Site constitute an emergency
situation or may present an immediate threat to public health or
welfare or the environment due to release or threatened release
of Waste Material.

43. EPA's Project Coordinator and the Settling Defendant's
Project Coordinator will meet in person or by teleconference, at
a minimum, on a monthly basis.

XIII. ASSURANCE OF ABILITY TO COMPLETE WORK

44. Within 30 days of entry of this Consent Decree,
Settling Defendant shall establish and maintain financial
security in the amount of \$4,409,723.50 in one or more of the
following forms:

- (a) A surety bond guaranteeing performance of the Work;
- (b) One or more irrevocable letters of credit equaling
the total estimated cost of the Work;
- (c) A trust fund;
- (d) A guarantee to perform the Work by one or more
parent corporations or subsidiaries, or by one or more unrelated
corporations that have a substantial business relationship with
Settling Defendant; and
- (e) A demonstration that Settling Defendant satisfies
the requirements of 40 C.F.R. Part 264.143(f).

45. If Settling Defendant seeks to demonstrate the ability
to complete the Work through a guarantee by a third party

pursuant to Paragraph 44(d) of this Consent Decree, Settling Defendant shall demonstrate that the guarantor satisfies the requirements of 40 C.F.R. Part 264.143(f). If Settling Defendant seeks to demonstrate the ability to complete the Work by means of the financial test or the corporate guarantee pursuant to Paragraph 44(d) or (e), it shall resubmit sworn statements conveying the information required by 40 C.F.R. Part 264.143(f) annually, on the anniversary of the effective date of this Consent Decree. If EPA determines at any time that the financial assurances provided pursuant to this Section are inadequate, Settling Defendant shall, within 30 days of receipt of notice of EPA's determination, obtain and present to EPA for approval one of the other forms of financial assurance listed in Paragraph 44 of this Consent Decree. Settling Defendant's inability to demonstrate financial ability to complete the Work shall not excuse performance of any activities required under this Consent Decree.

46. If Settling Defendant can show that the estimated cost to complete the remaining Work has diminished below the amount set forth in Paragraph 44 above after entry of this Consent Decree, Settling Defendant may, on any anniversary date of entry of this Consent Decree, or at any other time agreed to by the Parties, reduce the amount of the financial security provided under this Section to the estimated cost of the remaining work to be performed. Settling Defendant shall submit a proposal for such reduction to EPA, in accordance with the requirements of this Section, and may reduce the amount of the security upon approval by EPA. In the event of a dispute, Settling Defendant

may reduce the amount of the security in accordance with the final administrative or judicial decision resolving the dispute.

47. Settling Defendant may change the form of financial assurance provided under this Section at any time, upon notice to and approval by EPA, provided that the new form of assurance meets the requirements of this Section. In the event of a dispute, Settling Defendant may change the form of the financial assurance only in accordance with the final administrative or judicial decision resolving the dispute.

XIV. CERTIFICATION OF COMPLETION

48. Completion of the Remedial Action.

a. Within 90 days after Settling Defendant concludes that the Remedial Action has been fully performed and the Performance Standards have been attained for the Simplot OU Area, Settling Defendant shall schedule and conduct a pre-certification inspection to be attended by Settling Defendant, and EPA and the State at its option. If, after the pre-certification inspection, Settling Defendant still believes the Remedial Action has been fully performed and the Performance Standards have been attained, it shall submit a written report requesting certification to EPA for approval, with a copy to the State, pursuant to Section XI (EPA Approval of Plans and Other Submissions) within 30 days of the inspection. In the report, a registered professional engineer and Settling Defendant's Project Coordinator shall state that the Remedial Action has been completed in full satisfaction of the requirements of this Consent Decree. The written report shall include as-built drawings signed and stamped by a professional engineer. The report shall contain the following

statement, signed by a responsible corporate official of Settling
1 Defendant or Settling Defendant's Project Coordinator:

2 "To the best of my knowledge, after thorough
3 investigation, I certify that the information contained
4 in or accompanying this submission is true, accurate
5 and complete. I am aware that there are significant
penalties for submitting false information, including
the possibility of fine and imprisonment for knowing
violations."

6 If, after completion of the pre-certification inspection and
7 receipt and review of the written report, EPA determines that the
8 Remedial Action or any portion thereof has not been completed in
9 accordance with this Consent Decree or that the Performance
10 Standards have not been achieved at the Simplot OU, EPA will
11 notify Settling Defendant in writing of the activities that must
12 be undertaken by Settling Defendant pursuant to this Consent
13 Decree to complete the Remedial Action and achieve the
14 Performance Standards for the Simplot OU Area. Provided,
15 however, that EPA may only require Settling Defendant to perform
16 such activities pursuant to this Paragraph to the extent that
17 such activities are consistent with the "scope of the remedy
18 selected in the ROD," as that term is defined in Paragraph 14.b.
19 EPA will set forth in the notice a schedule for performance of
20 such activities consistent with the Consent Decree and the SOW or
21 require Settling Defendant to submit a schedule to EPA for
22 approval pursuant to Section XI (EPA Approval of Plans and Other
23 Submissions). Settling Defendant shall perform all activities
24 described in the notice in accordance with the specifications and
25 schedules established pursuant to this Paragraph, subject to its
26 right to invoke the dispute resolution procedures set forth in
27 Section XIX (Dispute Resolution).

b. If EPA concludes, based on the initial or any subsequent report requesting Certification of Completion and after a reasonable opportunity for review and comment by the State, that the Remedial Action has been performed in accordance with this Consent Decree and that the Performance Standards have been achieved, EPA will so certify in writing to Settling Defendant. This certification shall constitute the Certification of Completion of the Remedial Action for purposes of this Consent Decree, including, but not limited to, Section XXI (Covenants Not to Sue by Plaintiff). Certification of Completion of the Remedial Action shall not affect Settling Defendant's obligations under this Consent Decree.

49. Completion of the Work.

a. Within 90 days after Settling Defendant concludes that all phases of the Work (including O & M), have been fully performed, Settling Defendant shall schedule and conduct a pre-certification inspection to be attended by Settling Defendant, EPA and the State at its option. If, after the pre-certification inspection, Settling Defendant still believes that the Work has been fully performed, Settling Defendant shall submit a written report by a registered professional engineer stating that the Work has been completed in full satisfaction of the requirements of this Consent Decree. The report shall contain the following statement, signed by a responsible corporate official of Settling Defendant or the Settling Defendant's Project Coordinator:

"To the best of my knowledge, after thorough investigation, I certify that the information contained in or accompanying this submission is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing

violations."

1 If, after review of the written report, EPA determines that any
2 portion of the Work has not been completed in accordance with
3 this Consent Decree, EPA will notify Settling Defendant in
4 writing of the activities that must be undertaken by Settling
5 Defendant pursuant to this Consent Decree to complete the Work.
6 Provided, however, that EPA may only require Settling Defendant
7 to perform such activities pursuant to this Paragraph to the
8 extent that such activities are consistent with the "scope of the
9 remedy selected in the ROD," as that term is defined in Paragraph
10 14.b. EPA will set forth in the notice a schedule for
11 performance of such activities consistent with the Consent Decree
12 and the SOW or require the Settling Defendant to submit a
13 schedule to EPA for approval pursuant to Section XI (EPA Approval
14 of Plans and Other Submissions). Settling Defendant shall
15 perform all activities described in the notice in accordance with
16 the specifications and schedules established therein, subject to
17 its right to invoke the dispute resolution procedures set forth
18 in Section XIX (Dispute Resolution).

19 b. If EPA concludes, based on any request for
20 Certification of Completion by Settling Defendant that the Work
21 has been performed in accordance with this Consent Decree, EPA
22 will so notify the Settling Defendant in writing.

23 XV. EMERGENCY RESPONSE

24 50. In the event of any action or occurrence in connection
25 with the performance of the Work which causes or threatens a
26 release of Waste Material from the Site that constitutes an
27 emergency situation or may present an immediate threat to public
28

health or welfare or the environment, Settling Defendant shall,
1 subject to Paragraph 51, immediately take all appropriate action
2 to prevent, abate, or minimize such release or threat of release,
3 and shall immediately notify the EPA's Project Coordinator, or,
4 if the Project Coordinator is unavailable, EPA's Alternate
5 Project Coordinator. If neither of these persons is available,
6 the Settling Defendant shall notify the EPA Emergency Response
7 Unit, Region 10. Settling Defendant shall take such actions in
8 consultation with EPA's Project Coordinator or other available
9 authorized EPA officer and in accordance with all applicable
10 provisions of the Health and Safety Plans, the Contingency Plans,
11 and any other applicable plans or documents developed pursuant to
12 the SOW. If Settling Defendant fails to take appropriate
13 response action as required by this Section, and EPA takes such
14 action instead, Settling Defendant shall reimburse EPA for all
15 costs of the response action not inconsistent with the NCP
16 pursuant to Section XVI (Reimbursement of Response Costs).

17 51. Nothing in the preceding Paragraph or in this Consent
18 Decree shall be deemed to limit any authority of the United
19 States (a) to take all appropriate action to protect human health
20 and the environment or to prevent, abate, respond to, or minimize
21 an actual or threatened release of Waste Material on, at, or from
22 the Site, or (b) to direct or order such action, or seek an order
23 from the Court, to protect human health and the environment or to
24 prevent, abate, respond to, or minimize an actual or threatened
25 release of Waste Material on, at, or from the Site, subject to
26 Section XXI (Covenants Not to Sue by Plaintiff).

1 XVI. REIMBURSEMENT OF RESPONSE COSTS

2 52. Within 30 days after the effective date of this Consent
3 Decree, Settling Defendant shall pay the sum of \$90,436.90 to the
4 EPA Hazardous Substance Superfund in reimbursement of Past
5 Response Costs, by FedWire Electronic Funds Transfer ("EFT" or
6 wire transfer) to the U.S. Department of Justice account in
7 accordance with current electronic funds transfer procedures,
8 referencing the U.S.A.O. file number provided by the United
9 States, the EPA Region and Site/Spill ID #10D2 and DOJ case
10 number 90-7-1-889/2. Payment shall be made in accordance with
11 instructions provided to Settling Defendant by the Financial
12 Litigation Unit of the United States Attorney's Office for the
13 District of Idaho following lodging of the Consent Decree. Any
14 payments received by the Department of Justice after 4:00 P.M.
15 (Eastern Time) will be credited on the next business day.
16 Settling Defendant shall send notice that such payment has been
17 made to the United States as specified in Section XXVI (Notices
18 and Submissions) and to:

19 Joseph Penwell
20 Finance Section
21 U.S. EPA Region X, OMP-143
 1200 Sixth Avenue
 Seattle, Washington 98101

22 53. Settling Defendant shall reimburse the EPA Hazardous
23 Substance Superfund for all Future Response Costs for the Simplot
24 OU and one-half of all Interim Response Costs for the Site
25 incurred by the United States, subject to Paragraph 54. The
26 United States will send Settling Defendant a bill requiring
27 payment that includes a Scores cost summary, which includes

1 direct and indirect costs incurred by EPA and its contractors.
2 Settling Defendant shall make all payments within 30 days after
3 Settling Defendant's receipt of each bill requiring payment,
4 except as otherwise provided in Paragraph 54. Settling Defendant
5 shall make all payments required by this Paragraph in the form of
6 a certified or cashier's check or checks made payable to "EPA
7 Hazardous Substance Superfund" and referencing the EPA Region and
8 Site/Spill ID #1002, the DOJ case number 90-7-1-889/2, and the
9 name and address of the party making payment. Settling Defendant
10 shall send the check(s) to:

11 Mellon Bank
12 U.S. EPA Region 10
13 ATTN: Superfund Accounting
14 P.O. Box 360903M
15 Pittsburgh, Pennsylvania 15251

16 and shall send copies of the check(s) to the United States as
17 specified in Section XXVI (Notices and Submissions) and to Joseph
18 Penwell at the address specified in the preceding Paragraph.

19 54. Settling Defendant may contest payment of any Future
20 Response Costs under Paragraph 53 if it determines that the
21 United States has made an accounting error or if it alleges that
22 a cost item that is included represents costs for response
23 actions that are inconsistent with the NCP. Such objection
24 shall be made in writing within 30 days of receipt of the bill
25 and must be sent to the United States pursuant to Section XXVI
26 (Notices and Submissions). Any such objection shall specifically
27 identify the contested Future Response Costs and the basis for
28 objection. In the event of an objection, Settling Defendant
shall within the 30 day period pay all uncontested Future
Response Costs to the United States in the manner described in

1 Paragraph 53. Simultaneously, Settling Defendant shall establish
2 an interest-bearing escrow account in a federally-insured bank
3 duly chartered in the State of Idaho and remit to that escrow
4 account funds equivalent to the amount of the contested Future
5 Response Costs. Settling Defendant shall send to the United
6 States, as provided in Section XXVI (Notices and Submissions), a
7 copy of the transmittal letter and check paying the uncontested
8 Future Response Costs, and a copy of the correspondence that
9 establishes and funds the escrow account, including, but not
10 limited to, information containing the identity of the bank and
11 bank account under which the escrow account is established as
12 well as a bank statement showing the initial balance of the
13 escrow account. Simultaneously with establishment of the escrow
14 account, Settling Defendant shall initiate the Dispute Resolution
15 procedures in Section XIX (Dispute Resolution). If the United
16 States prevails in the dispute, within five days of the
17 resolution of the dispute, Settling Defendant shall pay the sums
18 due (with accrued interest) to the United States in the manner
19 described in Paragraph 53. If Settling Defendant prevails
20 concerning any aspect of the contested costs, Settling Defendant
21 shall pay that portion of the costs (plus associated accrued
22 interest) for which it did not prevail to the United States in
23 the manner described in Paragraph 53; Settling Defendant shall be
24 disbursed any balance of the escrow account. The dispute
25 resolution procedures set forth in this Paragraph in conjunction
26 with the procedures set forth in Section XIX (Dispute Resolution)
27 shall be the exclusive mechanisms for resolving disputes
28 regarding Settling Defendant's obligation to reimburse the United

1 States for its Future Response Costs.

2 55. If the payments required by Paragraph 52 are not made
3 within 30 days after the effective date of this Consent Decree or
4 the payments required by Paragraph 53 are not made within 30 days
5 after Settling Defendant's receipt of the bill, Settling
6 Defendant shall pay Interest on the unpaid balance. The Interest
7 to be paid on Past Response Costs under this Paragraph shall
8 begin to accrue 30 days after the effective date of this Consent
9 Decree. The Interest on Future Response Costs shall begin to
10 accrue on the date of the bill. The Interest shall accrue
11 through the date of Settling Defendant's payment. Payments of
12 Interest made under this Paragraph shall be in addition to such
13 other remedies or sanctions available to Plaintiff by virtue of
14 Settling Defendant's failure to make timely payments under this
15 Section. Settling Defendant shall make all payments required by
16 this Paragraph in the manner described in Paragraph 53.

17 XVII. INDEMNIFICATION AND INSURANCE

18 56. a. The United States does not assume any liability by
19 entering into this agreement or by virtue of any designation of
20 Settling Defendant as EPA's authorized representatives under
21 Section 104(e) of CERCLA. Settling Defendant shall indemnify,
22 save and hold harmless the United States and its officials,
23 agents, employees, contractors, subcontractors, or
24 representatives for or from any and all claims or causes of
25 action arising from, or on account of, negligent or other
26 wrongful acts or omissions of Settling Defendant, its officers,
27 directors, employees, agents, contractors, subcontractors, and
28 any persons acting on its behalf or under its control, in

1 carrying out activities pursuant to this Consent Decree,
2 including, but not limited to, any claims arising from any
3 designation of Settling Defendant as EPA's authorized
4 representative under Section 104(e) of CERCLA. Further, Settling
5 Defendant agrees to pay the United States all costs it incurs
6 including, but not limited to, attorneys fees and other expenses
7 of litigation and settlement arising from, or on account of,
8 claims made against the United States based on negligent or other
9 wrongful acts or omissions of Settling Defendant, its officers,
10 directors, employees, agents, contractors, subcontractors, and
11 any persons acting on its behalf or under its control, in
12 carrying out activities pursuant to this Consent Decree. The
13 United States shall not be held out as a party to any contract
14 entered into by or on behalf of Settling Defendant in carrying
15 out activities pursuant to this Consent Decree. Neither Settling
16 Defendant nor any such contractor shall be considered an agent of
17 the United States.

18 b. The United States shall give Settling Defendant
19 notice of any claim for which the United States plans to seek
20 indemnification pursuant to Paragraph 56.a, and shall consult
21 with Settling Defendant prior to settling such claim.

22 57. Settling Defendant waives all claims against the United
23 States for damages or reimbursement or for set-off of any
24 payments made or to be made to the United States arising from or
25 on account of any contract, agreement, or arrangement between
26 Settling Defendant and any person for performance of Work on or
27 relating to the Site, including, but not limited to, claims on
28 account of construction delays. In addition, Settling Defendant

1 shall indemnify and hold harmless the United States with respect
2 to any and all claims for damages or reimbursement arising from
3 or on account of any contract, agreement, or arrangement between
4 Settling Defendant and any person for performance of Work on or
5 relating to the Site, including, but not limited to, claims on
6 account of construction delays.

7 58. No later than 15 days before commencing any on-site
8 Work, Settling Defendant shall secure, and shall maintain until
9 the first anniversary of EPA's Certification of Completion of the
10 Remedial Action pursuant to Paragraph 48.b of Section XIV
11 (Certification of Completion) comprehensive general liability
12 insurance with limits of one million dollars, combined single
13 limit, and automobile liability insurance with limits of one
14 million dollars, combined single limit, naming the United States
15 as an additional insured. In addition, for the duration of this
16 Consent Decree, Settling Defendant shall satisfy, or shall ensure
17 that its contractors or subcontractors satisfy, all applicable
18 laws and regulations regarding the provision of worker's
19 compensation insurance for all persons performing the Work on
20 behalf of Settling Defendant in furtherance of this Consent
21 Decree. Prior to commencement of the Work under this Consent
22 Decree, Settling Defendant shall provide certificates of such
23 insurance and a copy of each insurance policy to EPA. Settling
24 Defendant shall resubmit such certificates and copies of policies
25 each year on the anniversary of the effective date of this
26 Consent Decree. If Settling Defendant demonstrates by evidence
27 satisfactory to EPA that any contractor or subcontractor
28 maintains insurance equivalent to that described above, or

1 insurance covering the same risks but in a lesser amount, then,
2 with respect to that contractor or subcontractor, Settling
3 Defendant need provide only that portion of the insurance
4 described above which is not maintained by the contractor or
5 subcontractor.

6 XVIII. FORCE MAJEURE

7 59. "Force majeure," for purposes of this Consent Decree,
8 is defined as any event arising from causes beyond the control of
9 Settling Defendant, of any entity controlled by Settling
10 Defendant, or of Settling Defendant's contractors, that delays or
11 prevents the performance of any obligation under this Consent
12 Decree despite Settling Defendant's best efforts to fulfill the
13 obligation. The requirement that Settling Defendant exercise
14 "best efforts to fulfill the obligation" includes using best
15 efforts to anticipate any potential force majeure event and best
16 efforts to address the effects of any potential force majeure
17 event (1) as it is occurring and (2) following the potential
18 force majeure event, such that the delay is minimized to the
19 greatest extent possible. "Force Majeure" does not include
20 financial inability to complete the Work or a failure to attain
21 the Performance Standards.

22 60. If any event occurs or has occurred that may delay the
23 performance of any obligation under this Consent Decree, whether
24 or not caused by a force majeure event, Settling Defendant shall
25 orally notify EPA's Project Coordinator or, in his or her
26 absence, EPA's Alternate Project Coordinator or, in the event
27 both of EPA's designated representatives are unavailable, the
28 Environmental Cleanup Office Director, EPA Region 10, within 48

1 hours after Settling Defendant first knew the event might cause a
2 delay. Within seven days thereafter, Settling Defendant shall
3 provide an explanation and description of the reasons for the
4 delay in writing to EPA; the anticipated duration of the delay;
5 all actions taken or to be taken to prevent or minimize the
6 delay; a schedule for implementation of any measures to be taken
7 to prevent or mitigate the delay or the effect of the delay;
8 Settling Defendant's rationale for attributing such delay to a
9 force majeure event if it intends to assert such a claim; and a
10 statement as to whether, in the opinion of Settling Defendant,
11 such event may cause or contribute to an endangerment to public
12 health, welfare or the environment. Settling Defendant shall
13 include with any notice all available documentation supporting
14 its claim that the delay was attributable to a force majeure.
15 Failure to comply with the above requirements shall preclude
16 Settling Defendant from asserting any claim of force majeure for
17 that event for the period of time of such failure to comply, and
18 for any additional delay caused by such failure. Settling
19 Defendant shall be deemed to know of any circumstance of which
20 Settling Defendant, any entity controlled by Settling Defendant,
21 or Settling Defendant's contractors knew or should have known.

22 61. If EPA agrees that the delay or anticipated delay is
23 attributable to a force majeure event, the time for performance
24 of the obligations under this Consent Decree that are affected by
25 the force majeure event will be extended by EPA for such time as
26 is necessary to complete those obligations. An extension of the
27 time for performance of the obligations affected by the force
28 majeure event shall not, of itself, extend the time for

1 performance of any other obligation. If EPA does not agree that
2 the delay or anticipated delay has been or will be caused by a
3 force majeure event, EPA will notify Settling Defendant in
4 writing of its decision. If EPA agrees that the delay is
5 attributable to a force majeure event, EPA will notify Settling
6 Defendant in writing of the length of the extension, if any, for
7 performance of the obligations affected by the force majeure
8 event.

9 62. If Settling Defendant elects to invoke the dispute
10 resolution procedures set forth in Section XIX (Dispute
11 Resolution), it shall do so no later than 15 days after receipt
12 of EPA's notice. In any such proceeding, Settling Defendant
13 shall have the burden of demonstrating by a preponderance of the
14 evidence that the delay or anticipated delay has been or will be
15 caused by a force majeure event, that the duration of the delay
16 or the extension sought was or will be warranted under the
17 circumstances, that best efforts were exercised to avoid and
18 mitigate the effects of the delay, and that Settling Defendant
19 complied with the requirements of Paragraphs 59 and 60 above. If
20 Settling Defendant carries this burden, the delay at issue shall
21 be deemed not to be a violation by Settling Defendant of the
22 affected obligation of this Consent Decree identified to EPA and
23 the Court.

24 XIX. DISPUTE RESOLUTION

25 63. Unless otherwise expressly provided for in this Consent
26 Decree, the dispute resolution procedures of this Section shall
27 be the exclusive mechanism to resolve disputes arising under or
28 with respect to this Consent Decree. However, the procedures set
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1 forth in this Section shall not apply to actions by the United
2 States to enforce obligations of Settling Defendant that have not
3 been disputed in accordance with this Section.

4 64. Any dispute which arises under or with respect to this
5 Consent Decree shall in the first instance be the subject of
6 informal negotiations between the parties to the dispute. The
7 period for informal negotiations shall not exceed 20 days from
8 the time the dispute arises, unless it is modified by written
9 agreement of the parties to the dispute. The dispute shall be
10 considered to have arisen when one party sends the other parties
11 a written Notice of Dispute.

12 65. a. In the event that the parties cannot resolve a
13 dispute by informal negotiations under the preceding Paragraph,
14 then the position advanced by EPA shall be considered binding
15 unless, within fourteen (14) days after the conclusion of the
16 informal negotiation period, Settling Defendant invokes the
17 formal dispute resolution procedures of this Section by serving a
18 written Statement of Position on the United States on the matter
19 in dispute, including, but not limited to, any factual data,
20 analysis or opinion supporting that position and any supporting
21 documentation relied upon by Settling Defendant. The Statement
22 of Position shall specify Settling Defendant's position as to
23 whether formal dispute resolution should proceed under Paragraph
24 66 or Paragraph 67.

25 b. Within fourteen days after receipt of Settling
26 Defendant's Statement of Position, EPA will serve its Statement
27 of Position on Settling Defendant, including, but not limited to,
28 any factual data, analysis, or opinion supporting that position

1 and all supporting documentation relied upon by EPA. EPA's
2 Statement of Position shall include a statement as to whether
3 formal dispute resolution should proceed under Paragraph 66 or
4 67. Within seven days after receipt of EPA's Statement of
5 Position, Settling Defendant may submit a Reply.

6 c. If there is disagreement between EPA and Settling
7 Defendant as to whether dispute resolution should proceed under
8 Paragraph 66 or 67, the parties to the dispute shall follow the
9 procedures set forth in the paragraph determined by EPA to be
10 applicable. However, if Settling Defendant ultimately appeals to
11 the Court to resolve the dispute, the Court shall determine which
12 paragraph is applicable in accordance with the standards of
13 applicability set forth in Paragraphs 66 and 67.

14 66. Formal dispute resolution for disputes pertaining to
15 the selection or adequacy of any response action and all other
16 disputes that are accorded review on the administrative record
17 under applicable principles of administrative law shall be
18 conducted pursuant to the procedures set forth in this Paragraph.
19 For purposes of this Paragraph, the adequacy of any response
20 action includes, without limitation: (1) the adequacy or
21 appropriateness of plans, procedures to implement plans, or any
22 other items requiring approval by EPA under this Consent Decree;
23 and (2) the adequacy of the performance of response actions taken
24 pursuant to this Consent Decree. Nothing in this Consent Decree
25 shall be construed to allow any dispute by Settling Defendant
26 regarding the validity of the ROD's provisions.

27 a. An administrative record of the dispute shall be
28 maintained by EPA and shall contain all statements of position,

1 including supporting documentation, submitted pursuant to this
2 Section. Where appropriate, EPA may allow submission of
3 supplemental statements of position by the parties to the
4 dispute.

5 b. The Director of the Environmental Cleanup Office
6 (ECL Director), EPA Region 10, will issue a final administrative
7 decision resolving the dispute based on the administrative record
8 described in Paragraph 66.a. This decision shall be binding upon
9 Settling Defendant, subject only to the right to seek judicial
10 review pursuant to Paragraph 66.c. and d.

11 c. Any administrative decision made by EPA pursuant to
12 Paragraph 66.b. shall be reviewable by this Court, provided that
13 a motion for judicial review of the decision is filed by Settling
14 Defendant with the Court and served on all Parties within ten
15 (10) days of receipt of EPA's decision. The motion shall include
16 a description of the matter in dispute, the efforts made by the
17 parties to resolve it, the relief requested, and the schedule, if
18 any, within which the dispute must be resolved to ensure orderly
19 implementation of this Consent Decree. The United States may
20 file a response to Settling Defendant's motion.

21 d. In proceedings on any dispute governed by this
22 Paragraph, Settling Defendant shall have the burden of
23 demonstrating that the decision of the ECL Director is arbitrary
24 and capricious or otherwise not in accordance with law. Judicial
25 review of EPA's decision shall be on the administrative record
26 compiled pursuant to Paragraph 66.a.

27 67. Formal dispute resolution for disputes that neither
28 pertain to the selection or adequacy of any response action nor

1 are otherwise accorded review on the administrative record under
2 applicable principles of administrative law, shall be governed by
3 this Paragraph.

4 a. Following receipt of Settling Defendant's
5 Statement of Position submitted pursuant to Paragraph 65, the ECL
6 Director will issue a final decision resolving the dispute. The
7 ECL Director's decision shall be binding on Settling Defendant
8 unless, within ten days of receipt of the decision, Settling
9 Defendant files with the Court and serves on the parties a motion
10 for judicial review of the decision setting forth the matter in
11 dispute, the efforts made by the parties to resolve it; the
12 relief requested, and the schedule, if any, within which the
13 dispute must be resolved to ensure orderly implementation of the
14 Consent Decree. The United States may file a response to Settling
15 Defendant's motion.

16 b. Notwithstanding Paragraph L of Section
17 I (Background) of this Consent Decree, judicial review of any
18 dispute governed by this Paragraph shall be governed by
19 applicable principles of law. Settling Defendant may waive any
20 formal decision by the ECL Director of disputes governed by this
21 Paragraph by setting forth its reasons for doing so in its
22 Statement of Position to EPA, and petitioning for judicial
23 dispute resolution not less than 30 days after having submitted
24 its Statement of Position. EPA may issue a Statement of Position
25 during this 30-day period.

26 68. The invocation of formal dispute resolution procedures
27 under this Section shall not extend, postpone or affect in any
28 way any obligation of Settling Defendant under this Consent

1 Decree, not directly in dispute, unless EPA or the Court agrees
2 otherwise. Stipulated penalties with respect to the disputed
3 matter shall continue to accrue but payment shall be stayed
4 pending resolution of the dispute as provided in Paragraph 76.
5 Notwithstanding the stay of payment, stipulated penalties shall
6 accrue from the first day of noncompliance with any applicable
7 provision of this Consent Decree. If Settling Defendant does not
8 prevail on the disputed issue, stipulated penalties shall be
9 assessed and paid as provided in Section XX (Stipulated
10 Penalties).

11 XX. STIPULATED PENALTIES

12 69. Settling Defendant shall be liable for stipulated
13 penalties in the amounts set forth in Paragraphs 70 and 71 to the
14 United States for failure to comply with the requirements of this
15 Consent Decree specified below, unless excused under Section
16 XVIII (Force Majeure). "Compliance" by Settling Defendant shall
17 include completion of the activities under this Consent Decree or
18 any report or work plan or other plan approved under this Consent
19 Decree identified below in accordance with all applicable
20 requirements of law, this Consent Decree, the SOW, and any plans
21 or other documents approved by EPA pursuant to this Consent
22 Decree and within the specified time schedules established by and
23 approved under this Consent Decree.

24 70. a. The following stipulated penalties shall accrue per
25 violation per day for any noncompliance identified in
26 Subparagraph b:

27 <u>Penalty Per Violation</u>	<u>Period of Noncompliance</u>
28 \$500	1st through 7th day

1	\$1,000	8th through 14th day
	\$3,000	15th through 30th day
2	\$7,500	31st through 90th day.

3 b. Failure to timely or adequately complete any
4 Remedial Action task(s) or work in accordance with the SOW or
5 deliverables and schedules in such deliverables which have been
6 approved by EPA pursuant to this Consent Decree; and such failure
7 does not constitute Force Majeure as defined in this Consent
8 Decree, and prior written consent or approval therefore was not
9 obtained by Settling Defendant from EPA.

10 71. The following stipulated penalties shall accrue per
11 violation per day for failure to submit timely or adequate
12 reports or other written documents, including periodic reports,
13 required pursuant to this Consent Decree:

14	<u>Penalty Per Violation</u>	<u>Period of Noncompliance</u>
15	\$300	1st through 7th day
	\$750	8th through 14th day
16	\$1,500	15th through 30th day
	\$3,000	31st through 90th day.

17 72. All penalties shall begin to accrue on the day after
18 the complete performance is due or the day a violation occurs,
19 and shall continue to accrue through the final day of the
20 correction of the noncompliance or completion of the activity.
21 However, stipulated penalties shall not accrue: (1) with respect
22 to a deficient submission under Section XI (EPA Approval of Plans
23 and Other Submissions), during the period, if any, beginning on
24 the 31st day after EPA's receipt of such submission until the
25 date that EPA notifies Settling Defendant of any deficiency; (2)
26 with respect to a decision by the ECL Director under Paragraph
27 66.b. or 67.a. of Section XIX (Dispute Resolution), during the
28

1 period, if any, beginning on the 21st day after the date Settling
2 Defendant's reply to EPA's Statement of Position is received
3 until the date the ECL Director issues a final decision regarding
4 such dispute; or (3) with respect to judicial review by this
5 Court of any dispute under Section XIX (Dispute Resolution),
6 during the period, if any, beginning on the 31st day after the
7 Court's receipt of the final submission regarding the dispute
8 until the date that the Court issues a final decision regarding
9 such dispute. Nothing herein shall prevent the simultaneous
10 accrual of separate penalties for separate violations of this
11 Consent Decree.

12 73. Following EPA's determination that Settling Defendant
13 has failed to comply with a requirement of this Consent Decree,
14 EPA may give Settling Defendant written notification and describe
15 the noncompliance. EPA may send Settling Defendant a written
16 demand for the payment of the penalties. However, penalties
17 shall accrue as provided in the preceding Paragraph regardless of
18 whether EPA has notified Settling Defendant of a violation.

19 74. All penalties accruing under this Section shall be due
20 and payable to the United States within 30 days of Settling
21 Defendant's receipt from EPA of a demand for payment of the
22 penalties, unless Settling Defendant invokes the Dispute
23 Resolution procedures under Section XIX (Dispute Resolution).
24 All payments to the United States under this Section shall be
25 paid by certified or cashier's check(s) made payable to "EPA
26 Hazardous Substances Superfund," shall be mailed to:
27
28

1 Mellon Bank
2 U.S. EPA Region 10
3 ATTN: Superfund Accounting
P.O. Box 360903M
Pittsburgh, Pennsylvania 15251

4 and shall indicate that the payment is for stipulated penalties,
5 and shall reference the EPA Region and Site/Spill ID #10D2, the
6 DOJ Case Number 90-7-1-889/2, and the name and address of the
7 party making payment. Copies of check(s) paid pursuant to this
8 Section, and any accompanying transmittal letter(s), shall be
9 sent to the United States as provided in Section XXVI, and to
10 Joseph Penwell at the address specified in Paragraph 52.

11 75. The payment of penalties shall not alter in any way
12 Settling Defendant's obligation to complete the performance of
13 the Work required under this Consent Decree.

14 76. Penalties shall continue to accrue as provided in
15 Paragraph 72 during any dispute resolution period, but need not
16 be paid until the following:

17 a. If the dispute is resolved by agreement or by a
18 decision of EPA that is not appealed to this Court, accrued
19 penalties determined to be owing shall be paid to EPA within 15
20 days of the agreement or the receipt of EPA's decision or order;

21 b. If the dispute is appealed to this Court and the
22 United States prevails in whole or in part, Settling Defendant
23 shall pay all accrued penalties determined by the Court to be
24 owed to EPA within 60 days of receipt of the Court's decision or
25 order, except as provided in Subparagraph c. below;

26 c. If the District Court's decision is appealed by any
27 Party, Settling Defendant shall pay all accrued penalties
28

1 determined by the District Court to be owing to the United States
2 into an interest-bearing escrow account within 60 days of receipt
3 of the Court's decision or order. Penalties shall be paid into
4 this account as they continue to accrue, at least every 60 days.
5 Within 15 days of receipt of the final appellate court decision,
6 the escrow agent shall pay the balance of the account to EPA or
7 to Settling Defendant to the extent it prevails.

8 77. a. If Settling Defendant fails to pay stipulated
9 penalties when due, the United States may institute proceedings
10 to collect the penalties, as well as interest. Settling
11 Defendant shall pay Interest on the unpaid balance, which shall
12 begin to accrue on the date of demand made pursuant to Paragraph
13 74.

14 b. Nothing in this Consent Decree shall be construed
15 as prohibiting, altering, or in any way limiting the ability of
16 the United States to seek any other remedies or sanctions
17 available by virtue of Settling Defendant's violation of this
18 Decree or of the statutes and regulations upon which it is based,
19 including, but not limited to, penalties pursuant to Section
20 122(1) of CERCLA. Provided, however, the United States shall not
21 seek civil penalties pursuant to Section 122(1) of CERCLA for any
22 violation for which a stipulated penalty is provided herein,
23 except in the case of a willful violation of the Consent Decree.

24 78. Notwithstanding any other provision of this Section,
25 the United States may, in its unreviewable discretion, waive any
26 portion of stipulated penalties that have accrued pursuant to
27 this Consent Decree.

28

1 79. In exercising its discretion, EPA may take into
2 account, among other things, the reason for the non-compliance,
3 whether Settling Defendant cured the violation in a timely
4 manner, whether the non-compliance caused delays in completing
5 the activities under the Consent Decree, and whether Settling
6 Defendant made a good faith effort to comply with the Consent
7 Decree.

8 XXI. COVENANTS NOT TO SUE BY PLAINTIFF

9 80. In consideration of the actions that will be performed
10 and the payments that will be made by Settling Defendant under,
11 this Consent Decree, and except as specifically provided in
12 Paragraphs 81, 82 and 84 of this Section, the United States
13 covenants not to sue or to take administrative action against
14 Settling Defendant pursuant to Sections 106 and 107(a) of CERCLA
15 for recovery of Past and Interim Response Costs at the Site, for
16 implementation of response actions for the Simplot OU and FMC OU
17 Areas of the Site, and for recovery of Future Response Costs for
18 the Simplot and FMC OU Areas of the Site. The covenant not to
19 sue for Past Response Costs shall take effect upon the receipt by
20 EPA of the payments required by Paragraph 52 of Section XVI
21 (Reimbursement of Response Costs). The covenant not to sue for
22 each Future Response Cost and Interim Response Cost Payment(s)
23 shall take effect upon the receipt by EPA of each such payment
24 required by Paragraph 53. The covenant not to sue under Section
25 106 of CERCLA, 42 U.S.C. § 9606, for the work to be performed
26 for the Simplot OU and FMC OU Areas of the Site shall take effect
27 upon Certification of Completion of Remedial Action by EPA
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1 pursuant to Paragraph 48.b of Section XIV (Certification of
2 Completion). These covenants not to sue are conditioned upon the
3 satisfactory performance by Settling Defendant of its obligations
4 under this Consent Decree. These covenants not to sue extend
5 only to Settling Defendant and do not extend to any other person.

6 81. United States' Pre-certification reservations.

7 Notwithstanding any other provision of this Consent Decree, the
8 United States reserves, and this Consent Decree is without
9 prejudice to, the right to institute proceedings in this action
10 or in a new action, or to issue an administrative order seeking
11 to compel Settling Defendant (1) to perform further response
12 actions relating to the Simplot and FMC OU Areas or (2) to
13 reimburse the United States for additional costs of response if,
14 prior to Certification of Completion of the Remedial Action:

- 15 (i) conditions at the Simplot or FMC OU Areas,
16 previously unknown to EPA, are discovered, or
17 (ii) information, previously unknown to EPA, is
18 received, in whole or in part,
19 and these previously unknown conditions or information together
20 with any other relevant information indicates that the Remedial
21 Action is not protective of human health or the environment.

22 82. United States' Post-certification reservations.

23 Notwithstanding any other provision of this Consent Decree, the
24 United States reserves, and this Consent Decree is without
25 prejudice to, the right to institute proceedings in this action
26 or in a new action, or to issue an administrative order seeking
27 to compel Settling Defendant (1) to perform further response
28

1 actions relating to the Simplot and FMC OU Areas of the Site, or
2 (2) to reimburse the United States for additional costs of
3 response if, subsequent to Certification of Completion of the
4 Remedial Action:

5 (i) conditions at the Simplot or FMC OU Areas,
6 previously unknown to EPA, are discovered, or
7 (ii) information, previously unknown to EPA, is
8 received, in whole or in part,
9 and these previously unknown conditions or this information
10 together with other relevant information indicate that the
11 Remedial Action is not protective of human health or the
12 environment.

13 83. For purposes of Paragraph 81, the information and the
14 conditions known to EPA shall include only that information and
15 those conditions known to EPA as of the date the ROD was signed
16 and set forth in the Record of Decision for the Site and the
17 administrative record supporting the Record of Decision. For
18 purposes of Paragraph 82, the information and the conditions
19 known to EPA shall include only that information and those
20 conditions known to EPA as of the date of Certification of
21 Completion of the Remedial Action and set forth in the Record of
22 Decision, the administrative record supporting the Record of
23 Decision, the post-ROD administrative record, or in any
24 information received by EPA pursuant to the requirements of this
25 Consent Decree prior to Certification of Completion of the
26 Remedial Action.

27 84. General reservations of rights. The covenants not to
28

1 sue set forth above do not pertain to any matters other than
2 those expressly specified in Paragraph 80. The United States
3 reserves, and this Consent Decree is without prejudice to, all
4 rights against Settling Defendant with respect to all other
5 matters, including but not limited to, the following:

6 (a) claims based on a failure by Settling Defendant to
7 meet a requirement of this Consent Decree;

8 (b) liability arising from the past, present, or
9 future disposal, release, or threat of release of Waste
10 Materials outside of the Simplot and FMC OU Areas of the
11 Site;

12 (c) liability for future disposal of Waste Materials
13 at the Site, other than as provided in the ROD, the Work, or
14 otherwise ordered by EPA;

15 (d) liability for damages for injury to, destruction
16 of, or loss of natural resources, and for the costs of any
17 natural resource damage assessments;

18 (e) criminal liability;

19 (f) liability for violations of federal or state law
20 which occur during or after implementation of the Remedial
21 Action;

22 (g) liability, prior to Certification of
23 Completion of the Remedial Action, for additional
24 response actions that EPA determines are necessary to
25 achieve Performance Standards, but that cannot be
26 required pursuant to Paragraph 14 (Modification of the
27 SOW or Related Work Plans);
28

1 (h) liability under Section 107 of CERCLA,
2 42 U.S.C. § 9607, for the costs of any health assessment or
3 health effects study carried out under Section 104(i) of
4 CERCLA, in response to a release or threatened release of
5 hazardous substances from the Site; and

6 (i) liability under Sections 106 and 107 of CERCLA for
7 (a) additional response actions within the Simplot OU Area
8 to address releases of hazardous substances in the off-plant
9 areas of the Site, as defined in Section 1.3 of the ROD,
10 other than any federally permitted release as defined in 42
11 U.S.C. § 9601(10) and as established by Simplot; and (b)
12 liability for response costs incurred in connection with
13 such response actions.

14 (j) liability under Sections 106 and 107 of CERCLA for
15 releases of orthophosphates to groundwater from Simplot
16 sources other than the phosphogypsum stack.

17 85. Work Takeover. If EPA determines Settling Defendant
18 has ceased implementation of any portion of the Work, is
19 seriously or repeatedly deficient or late in performance of the
20 Work, or in implementing the Work in a manner which may cause an
21 endangerment to human health or the environment, EPA may assume
22 the performance of all or any portions of the Work as EPA
23 determines necessary. Settling Defendant may invoke the
24 procedures set forth in Section XIX (Dispute Resolution),
25 Paragraph 66, to dispute EPA's determination that takeover of the
26 Work is warranted under this Paragraph. Costs incurred by the
27 United States in performing the Work pursuant to this Paragraph
28

1 shall be considered Future Response Costs that Settling Defendant
2 shall pay pursuant to Section XVI (Reimbursement of Response
3 Costs).

4 86. Notwithstanding any other provision of this Consent
5 Decree, the United States retains all authority and reserves all
6 rights to take any and all response actions authorized by law.

7 XXII. COVENANTS BY SETTLING DEFENDANT

8 87. Covenant Not to Sue. Subject to the reservations in
9 Paragraph 88, Settling Defendant hereby covenants not to sue and
10 agrees not to assert any claims or causes of action against the
11 United States with respect to the Simplot and FMC OU Areas of the
12 Site, and Past and Interim and Future Response Costs as defined
13 herein, or this Consent Decree, including, but not limited to:

14 a. any direct or indirect claim for reimbursement
15 from the Hazardous Substance Superfund (established pursuant to
16 the Internal Revenue Code, 26 U.S.C. § 9507) through CERCLA
17 Sections 106(b)(2), 107, 111, 112, 113 or any other provision of
18 law;

19 b. any claims against the United States, including
20 any department, agency or instrumentality of the United States
21 under CERCLA Sections 107 or 113 related to the Simplot and FMC
22 OU Areas of the Site, or

23 c. any claims arising out of response activities for
24 the Simplot and FMC OU Areas of the Site, including claims based
25 on EPA's selection of response actions, oversight of response
26 activities or approval of plans for such activities.

27 88. Settling Defendant reserves, and this Consent Decree is
28

1 without prejudice to, claims against the United States, subject
2 to the provisions of Chapter 171 of Title 28 of the United States
3 Code, for money damages for injury or loss of property or
4 personal injury or death caused by the negligent or wrongful act
5 or omission of any employee of the United States while acting
6 within the scope of his office or employment under circumstances
7 where the United States, if a private person, would be liable to
8 the claimant in accordance with the law of the place where the
9 act or omission occurred. However, any such claim shall not
10 include a claim for any damages caused, in whole or in part, by
11 the act or omission of any person, including any contractor, who
12 is not a federal employee as that term is defined in 28 U.S.C.
13 § 2671; nor shall any such claim include a claim based on EPA's
14 selection of response actions, or the oversight or approval of
15 Settling Defendant's plans or activities. The foregoing applies
16 only to claims which are brought pursuant to any statute other
17 than CERCLA and for which the waiver of sovereign immunity is
18 found in a statute other than CERCLA.

19 89. Nothing in this Consent Decree shall be deemed to
20 constitute preauthorization of a claim within the meaning of
21 Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R.
22 § 300.700(d).

23 XXIII. EFFECT OF SETTLEMENT; CONTRIBUTION PROTECTION

24 90. Nothing in this Consent Decree shall be construed to
25 create any rights in, or grant any cause of action to, any person
26 not a Party to this Consent Decree. The preceding sentence shall
27 not be construed to waive or nullify any rights that any person
28

1 not a signatory to this Decree may have under applicable law.
2 Each of the Parties expressly reserves any and all rights
3 (including, but not limited to, any right to contribution),
4 defenses, claims, demands, and causes of action which each Party
5 may have with respect to any matter, transaction, or occurrence
6 relating in any way to the Site against any person not a Party
7 hereto.

8 91. The Parties agree, and by entering this Consent Decree
9 this Court finds, Settling Defendant is entitled, as of the
10 effective date of this Consent Decree, to protection from
11 contribution actions or claims as provided by CERCLA Section
12 113(f)(2), 42 U.S.C. § 9613(f)(2), for matters addressed in this
13 Consent Decree. Settling Defendant agrees that, with respect to
14 any suit or claim for contribution brought by it for matters
15 addressed in this Consent Decree, it will notify the United
16 States in writing no later than 60 days prior to the initiation
17 of such suit or claim. For purposes of this Paragraph, "matters
18 addressed in this Consent Decree" shall mean all response actions
19 taken or to be taken and all response costs incurred or to be
20 incurred by any party or any other person or entity, including
21 any of their officers, directors, employees, with respect to
22 Simplot and FMC OU Areas.

23 92. Settling Defendant also agrees that with respect to any
24 suit or claim for contribution brought against it for matters
25 related to this Consent Decree it will notify in writing the
26 United States within 10 days of service of the complaint on it.
27 In addition, Settling Defendant shall notify the United States
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